

## Message Text

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ORIGIN L-03

INFO OCT-01 AF-08 ISO-00 OPIC-06 AID-05 CIAE-00 COME-00

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DRAFTED BY L/M:SHWHILDEN:MFM

APPROVED BY L/M:KEMALMBORG

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R 282043Z JUL 76

FM SECSTATE WASHDC

TO AMEMBASSY NAIROBI

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E.O. 11652: N/A

TAGS: CFED

SUBJECT: TAW TRANSFERS

1. FOLLOWING IS TEXT OF PROPOSED NOTE RE TRANSFER APPROVAL.  
TEXT REFLECTS FINAL INPUT FROM DEPT. IF POST HAS COMMENTS  
OR CHANGES FEEL FREE TO REPORT SAME. IF NOT, PLEASE DE-  
LIVER NOTE ASAP.

2. BEGIN TEXT: "THE EMBASSY OF THE UNITED STATES OF  
AMERICA (THE "EMBASSY") PRESENTS ITS COMPLEMENTS TO THE  
MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF KENYA AND  
HAS THE HONOR TO REQUEST THE MINISTRY TO CONFIRM THE AP-  
PLICABILITY OF THE BILATERAL INVESTMENT GUARANTIES AGREE-  
MENT OF 1964 (THE "IGA") BETWEEN THE GOVERNMENTS OF KENYA  
AND THE UNITED STATES OF AMERICA TO A PARTICULAR CURRENCY  
TRANSFER RECEIVED BY THE EMBASSY FROM A BUSINESS FIRM IN  
KENYA.

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3. DURING THE PAST TWO MONTHS THE EMBASSY HAS ENGAGED IN

DISCUSSIONS AND CORRESPONDENCE WITH OFFICIALS OF THE CENTRAL BANK OF KENYA (THE "BANK") REGARDING THE PAYMENT OF KENYA SHILLINGS INTO THE EMBASSY'S ACCOUNT IN SATISFACTION OF DEBTS OWED BY A FIRM DOING BUSINESS IN KENYA TO AN AGENCY OF THE US GOVERNMENT (THE "USG").

4. THE BANK HAS SUGGESTED TO THE EMBASSY THAT SUCH PAYMENT, AFFECTED IN AUGUST, 1975, WAS IN VIOLATION OF THE KENYAN EXCHANGE CONTROL ACT. THE BANK, HOWEVER, APPARENTLY DID NOT CONSIDER, AND DID NOT EVIDENCE AWARENESS OF, THOSE PROVISIONS OF THE IGA WHICH SPECIFICALLY SANCTIONED SUCH TRANSFERS, AND WHICH CREATE FOR THE USG CERTAIN RIGHTS WITH RESPECT TO THE RECEPTION AND USE OF SHILLING CURRENCY IN ADDITION TO THOSE RIGHTS ESTABLISHED BY THE EXCHANGE CONTROL ACT. THE EMBASSY WOULD APPRECIATE THE MINISTRY'S CONFIRMATION OF THE APPLICABILITY OF THE IGA TO THE PARTICULAR CIRCUMSTANCES OF THE CURRENCY TRANSFER IN QUESTION.

5. THE TRANSACTION OCCURRED IN THE FOLLOWING MANNER: TAW INTERNATIONAL LEASING CORPORATION ("TAW"), A LIBERIAN CORPORATION WITH HEADQUARTERS IN NAIROBI, IN ORDER TO UNDERTAKE A TRUCK LEASING BUSINESS IN CERTAIN AFRICAN COUNTRIES, INCLUDING KENYA, OBTAINED A SUBSTANTIAL LOAN FROM A US FINANCIAL INSTITUTION AND ADDITIONAL FINANCING AND SALES CREDITS FROM OTHER US CORPORATIONS. THE OVERSEAS PRIVATE INVESTMENT CORPORATION ("OPIC"), THE USG AGENCY RESPONSIBLE FOR PROMOTING OVERSEAS INVESTMENTS THROUGH LOAN GUARANTY AND INSURANCE PROGRAMS, AGREED, FOR TAW'S BENEFIT, TO GUARANTEE THE LOAN MADE BY SUCH US FINANCIAL INSTITUTIONS.

6. WHEN TAW DEFAULTED ON LOAN PAYMENTS TO ITS US CREDITORS IN LATE 1974, OPIC, IN COMPLIANCE WITH THE TERMS OF ITS GUARANTY, COMPENSATED THE US FINANCIAL INSTITUTION FOR THE PORTION OF ITS LOAN THEN DUE AND OWING FROM TAW. THE REMAINING CREDITORS, INCLUDING OPIC, INITIATED NEGOTIATIONS WITH TAW MANAGEMENT FOR PAYMENT OF THE BALANCES TO THEM. AN AGREEMENT REACHED IN EARLY 1975 BETWEEN A CREDITORS' CONSORTIUM AND TAW (THE "AGREEMENT") ESTABLISHED, INTER ALIA: (1) A FORMULA FOR THE REPAYMENT OF OUTSTANDING DEBTS FROM PROSPECTIVE TAW EARNINGS AND OTHER ASSETS; AND (2) A SYSTEM FOR REMITTING DEBT REPAYMENTS TO TAW'S CREDITORS INCLUDING OPIC, AND TO ANY DESIGNEES OF SUCH CREDITORS.

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7. IN AUGUST, 1975, FUNDS WERE RECEIVED BY THE EMBASSY FROM TAW PURSUANT TO THE AGREEMENT AND IN REDUCTION OF

THE INDEBTEDNESS OWED BY TAW TO THE USG ARISING FROM OPIC'S PAYMENT OF THE US FINANCIAL INSTITUTIONS GUARANTY CLAIM.

8. IN RECEIVING THE SHILLING TRANSFERS FROM TAW'S KENYA OFFICE, THE EMBASSY FOLLOWED ITS ROUTINE PROCEDURE OF SUBMITTING A REPORT AT THE END OF THE MONTH TO THE BANK IDENTIFYING THE AMOUNT AND SOURCE OF THE FUNDS. THIS REPORT, KENYA CURRENCY TRANSFER FORM E-1, WAS APPROVED BY THE BANK. THE SHILLINGS RECEIVED WERE RETAINED IN AN EMBASSY ACCOUNT AND COMPLETELY SPENT IN KENYA IN THE NORMAL COURSE OF THE EMBASSY'S BUSINESS.

9. DESPITE THE FACT THAT IT WAS TAW'S OBLIGATION TO TRANSFER TO ITS CREDITORS KENYA SHILLINGS AND OTHER CURRENCY IN COMPLIANCE WITH LOCAL LAWS AND REGULATIONS, TAW, IN FEBRUARY, 1976, IMPUGNED THE LEGALITY OF THE CURRENCY TRANSFERS WHICH TAW HAD ALREADY MADE, CLAIMING THAT ITS FAILURE TO SEEK PRIOR BANK APPROVAL FOR THE DEPOSIT OF FUNDS INTO THE EMBASSY ACCOUNT HAD VIOLATED EXCHANGE REGULATIONS. IN SUBSEQUENT DISCUSSIONS AND CORRESPONDENCE WITH EMBASSY OFFICERS, BANK EXCHANGE CONTROL OFFICIALS OPINED THAT THE TRANSACTION HAD VIOLATED THE EXCHANGE CONTROL ACT. NEITHER THE TAW PRONOUNCEMENT NOR THE BANK STATEMENTS TO THE EMBASSY, HOWEVER, ADDRESSED THE MATTER OF THE SPECIAL USG RIGHTS ESTABLISHED BY THE IGA.

10. IT IS THE BELIEF OF THE USG THAT THE TERMS OF THE IGA, INDEPENDENTLY AND WITHOUT MORE, ESTABLISH A MECHANISM WHEREBY THE EMBASSY MAY RECEIVE KENYAN SHILLINGS PURSUANT TO ANY INVESTMENT GUARANTY ISSUED WITH RESPECT TO PROJECTS APPROVED BY THE GOVERNMENT OF KENYA, AND MAY USE SUCH CURRENCY TO DEFRAY OFFICIAL USG EXPENSES INCURRED IN KENYA.  
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11. THE PERTINENT SECTIONS OF THE IGA ARE AS FOLLOWS:  
PARA 3: "IF AN INVESTOR TRANSFERS TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA PURSUANT TO AN INVESTMENT GUARANTY, (A) LAWFUL CURRENCY, INCLUDING CREDITS THEREOF, OF KENYA...THE GOVERNMENT OF KENYA SHALL RECOGNIZE SUCH TRANSFER AS VALID AND EFFECTIVE;" AND PARA 4: "LAWFUL CURRENCY OF KENYA, INCLUDING CREDITS THEREOF, WHICH IS ACQUIRED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA PURSUANT TO A TRANSFER OF CURRENCY...UNDER AN INVESTMENT GUARANTY...MAY IN ANY EVENT BE USED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR ANY OF ITS EXPENDITURES IN KENYA."

12. THE USG DOES RESPECTFULLY SUBMIT THAT THE FOLLOWING

POINTS ARE ESTABLISHED BY THE FOREGOING IGA PROVISIONS:

13. (A) TRANSFERS OF KENYAN SHILLINGS TO THE USG PURSUANT TO INVESTMENT GUARANTIES ARE SPECIFICALLY SANCTIONED BY, AND PROVIDED FOR IN, THE IGA, AND SUCH TRANSFERS ARE,

BY THE TERMS OF THE IGA, SPECIFICALLY ENTITLED TO BE RECOGNIZED AS VALID BY THE GOVERNMENT OF KENYA;

14. (B) THE REQUIREMENT OF THE IGA THAT SUCH RECOGNITION "SHALL" BE GRANTED MEANS THAT APPROVAL OF SUCH TRANSFERS IS MADE BY THE TERMS OF THE IGA WITHOUT ANY FURTHER APPROVAL BEING SPECIFIED OR REQUIRED;

15. (C) THE EXCHANGE CONTROL ACT OF KENYA, WHICH HAD BEEN ENACTED AT THE TIME THE IGA WAS CONCLUDED, SPECIFIES THAT ALL CURRENCY TRANSFERS SUBJECT TO ITS PROVISIONS MUST EITHER HAVE THE PRIOR APPROVAL OF THE MINISTER OF FINANCE AND PLANNING OR HAVE BEEN EXEMPTED BY HIM FROM THE REQUIREMENT OF SUCH APPROVAL. THE PURPOSE OF THE IGA WAS TO CREATE FOR THE USG CURRENCY TRANSFER RIGHTS FOR A LIMITED PURPOSE IN ADDITION TO RIGHTS WHICH ALREADY EXISTED UNDER THE "PRIOR APPROVAL" REQUIREMENTS FOR CURRENCY TRANSFERS GENERALLY. IT MIGHT BE NOTED IN THIS CONNECTION THAT THE WELL ESTABLISHED PRACTICE OF THE EMBASSY IS TO REPORT SUCH TRANSFERS, AS WELL AS ALL OTHER UNCLASSIFIED

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FOREIGN EXCHANGE TRANSACTIONS, ONLY AFTER THEY HAVE BEEN EFFECTED BY THE EMBASSY;

16. (D) LOCAL CURRENCY ACQUIRED BY THE USG PURSUANT TO AN INVESTMENT GUARANTY SHALL BE AVAILABLE TO THE USG TO DEFRAY ITS EXPENSES IN KENYA AND CONSEQUENTLY, REGARDLESS OF WHAT EXCHANGE FACILITIES ARE AVAILABLE TO INVESTORS GENERALLY, THE USG UNDER ANY PREVAILING EXCHANGE CONDITIONS MAY, AS WAS DONE IN THE INSTANT CASE, USE KENYAN SHILLINGS FOR ITS LOCAL KENYAN EXPENSES.

17. SINCE THE FUNDS IN QUESTION WERE TRANSFERRED PURSUANT TO OPIC'S PAYMENT OF AN EXTENDED RISK LOAN GUARANTY AND NOT OF A SPECIFIC POLITICAL RISK GUARANTY, AND THE GOK FGA ON THE TAW PROJECT IN 1973 AUTHORIZED USG GRANT OF POLITICAL RISK GUARANTY BUT DID NOT MENTION AN EXTENDED RISK GUARANTY, THE GOK MAY ALLOW THAT SINCE IT NEVER AUTHORIZED AN EXTENDED RISK GUARANTY, ANY FUNDS TRANSFERRED PURSUANT TO AN EXTENDED RISK GUARANTY ARE NOT ENTITLED TO THE BENEFITS OF THE IGA. HOWEVER, THE IGA REQUIRES ONLY THAT THE GOK APPROVE THE PROJECT AND APPROVE THE ISSUANCE TO IT OF INVESTMENT GUARANTIES. ONCE THESE TWO APPROVALS HAVE BEEN

GIVEN, THE USG MAY ISSUE GUARANTIES ON SUCH TERMS AS IT ELECTS TO ACCORD TO THE US INVESTOR, WITHOUT SEEKING FURTHER APPROVAL OF THE TERMS AND SPECIFICATIONS OF SUCH GUARANTIES FROM THE GOK.

18. IN VIEW OF THE FOREGOING FACTS, THE USG RESPECTFULLY REQUESTS CONFIRMATION FROM THE MINISTRY THAT THE REFERENCED TRANSFER OF CURRENCY TO THE EMBASSY WAS IN CONFORMANCE WITH THE TERMS OF THE IGA AND THEREFORE COULD NOT HAVE VIOLATED THE EXCHANGE REGULATIONS OF KENYA.

19. THE USG REGRETS ANY INCONVENIENCE OR MISUNDERSTANDING WHICH MAY HAVE ARISEN REGARDING THIS CURRENCY TRANSFER." END OF TEXT. KISSINGER

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## Message Attributes

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